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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 779

ELADE REALTY CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 48–52) has not yet been reported. The opinion of the district court denying a motion to dismiss the information appears at pages 15–23 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered November 12, 1946 (R. 52). The petition for a writ of certiorari was filed December 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, in the exercise of the power to allocate scarce building materials in the interest of national defense, it was proper to exact the condition that housing units to which materials were allocated be sold at a maximum price fixed by the builder.

2. Whether the fact that non-compliance with such condition was not a crime when the allocations were made precluded the administrative agencies exercising the function of allocation from thereafter ordering compliance as to future sales and thus making failure to comply a crime under the Second War Powers Act.

3. Whether the information was sufficiently definite and certain to state an offense.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations appear in the Appendix, *infra.* pp. 12–18.

STATEMENT

The Second War Powers Act conferred upon the President the power, whenever he was satisfied that fulfillment of requirements for defense

would result in a shortage of materials, to allocate materials and supplies in such manner and upon such conditions as he should deem necessary or appropriate in the public interest and to promote the national defense (Appendix, *infra*, p. 12). Pursuant to authority delegated to it by the President, the War Production Board on April 9, 1942, issued Conservation Order L–41 (7 Fed. Reg. 2730) substantially forbidding all new construction without authorization. The order exempted construction given priorities assistance by the issuance of preference ratings for certain specified kinds of construction, including a P–55 rating in respect of privately financed defense housing. Such rating had originally been established by order of the Office of Production Management on September 22, 1941 (6 Fed. Reg. 4842), for defense housing projects. (See Appendix, *infra*, pp. 13–14.) The rating was issued on the basis of an application by the builder, referred to in the order as Form PD–105, in which the builder set forth the nature of his anticipated project, agreed to give either exclusive or preferential occupancy to defense workers at the maximum rental, and agreed not to sell the unit above a price which he fixed in the application. On February 12, 1943, Preference Rating Order P–55 was amended to include a provision ordering persons who obtained priority

assistance to comply with the representations in the application (8 Fed. Reg. 1951).

On February 20, 1943, Preference Rating Order P–55a was issued by the War Production Board prohibiting sales of houses previously given priorities assistance under P–55 at prices other than those fixed in the application, "except as authorized by regulations or orders of the National Housing Agency" (8 Fed. Reg. 2260; Appendix, *infra,* p. 16).

The National Housing Agency, which was given responsibility for securing the proper occupancy of housing for war workers, on February 9, 1943, issued its General Orders Nos. 60–2 and 60–3 (8 Fed. Reg. 1829, 1830, Appendix, *infra,* pp. 17–18), covering private war housing, including housing for which priority assistance had been obtained prior to February 10, 1943. These orders provided that such housing should be rented, sold, or transferred only in accordance with the provisions of the application for priority assistance, unless a different disposition had theretofore been authorized by the War Production Board or should thereafter be authorized by the National Housing Agency. These provisions against resale on conditions other than those stated in the application for priorities, unless some different disposition was authorized, were continued in subsequent amendments and reissues of these

regulations until October 15, 1945, when they were revoked (Appendix, *infra*, pp. 17–18).

An information in 28 counts was filed against petitioner and its president in the United States District Court for the Eastern District of New York, each count charging that on a specified date between March and August of 1945, the defendants sold a specified housing unit at a certain price in excess of $5,000, "even though the construction of such unit had been made possible by priorities assistance which was granted upon the condition and agreement that such unit would be sold at a price not in excess of $4,990" (R. 6–11).

The defendants moved to dismiss the information on the ground that it did not state facts sufficient to constitute a crime and on the further ground that, in so far as the regulations on which the information was based purported to render criminal the acts charged therein, they violated the Fifth Amendment to the Constitution (R. 12–14). The district court denied the motion to dismiss (R. 24) in an opinion in which it upheld the validity of the information and the regulations on which it was based (R. 15–23).

Thereafter, petitioner pleaded guilty to five counts of the information and moved in arrest of judgment on the ground that the information failed to state an offense (R. 25). That motion was denied (R. 28). Petitioner was fined $3,500

on each of these counts, or a total of $17,500 (R. 35). The other counts were dismissed as to petitioner and all counts were dismissed as to its president (R. 35). Petitioner again moved in arrest of judgment and its motion was again denied (R. 35–36).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of the district court was affirmed (R. 52). In determining the validity of the regulations as applied to petitioner, the circuit court of appeals accepted, as amplifying the allegations of the information, a statement by petitioner's president at the time of sentence that the houses involved in the information had been substantially completed by February 10, 1943 (R. 49, 50; see R. 31).

ARGUMENT

1. Petitioner contends (Pet. 7, 18–31) that the authority to allocate scarce materials conferred by the Second War Powers Act did not include authority to fix resale prices as a condition to the granting of such priorities, and hence that the War Production Board and the National Housing Agency were without power to issue regulations prohibiting sales at prices higher than those fixed in the application for priorities. However, as both courts below pointed out (R. 20, 50), although the act under which these regulations were issued did not authorize general price fixing as such, it does not follow that the agencies

charged with the duty of allocation could not adopt any measure calculated to carry out the purposes of that act, including price fixing, if such a device reasonably tended to further these purposes. The courts have held, in relation to other aspects of the allocation power, that the administrative agency charged with its execution could properly adopt measures reasonably designed to carry out the purposes of the act. *L. P. Steuart and Bro., Inc.* v. *Bowles,* 322 U. S. 398; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222, 224 (C. C. A. 5), certiorari denied, 323 U. S. 749; *Gallagher's Steak House, Inc.* v. *Bowles,* 142 F. 2d 530, 534 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Varney* v. *Warehime,* 147 F. 2d 238, 244–245 (C. C. A. 6), certiorari denied, 325 U. S. 882.

The allocation of scarce building materials only to housing which was to be resold at a low cost had a direct tendency to further the public interest and to promote national defense. In the first place, as the court below said (R. 50), if scarce materials were to be used only for inexpensive houses, it necessarily followed that less materials would be used per house and thus more houses built with the materials available. Furthermore, the requirement that prices be kept low would also have the result of making the houses available to the group for which they were primarily intended, the workers in defense industries. Building priorities for private housing were granted

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only in areas where there were substantial groups of defense workers. (See United States Government Manual issued by the Division of Public Inquiries, Office of War Information, 1945, p. 129, quoted at Pet. 19.) To accomplish the purpose of making housing available for these groups, it was necessary that the houses to be built be sold at prices which defense workers could pay. Even assuming, as petitioner argues, that sales were not absolutely limited to defense workers alone, it was nevertheless necessary, in order to make housing available to defense workers, that the houses on the market be within the financial reach of such workers. Hence, the limitation of prices in this particular field as a condition to the allocation of materials for building had a direct tendency effectively to implement allocation of materials for the national defense, and thus to further the specific objectives of the Second War Powers Act.

If it was proper to annex to the allocation of materials a condition that the houses be sold only at maximum prices fixed by the builder, then it was clearly proper to order the builder to maintain the prices which he himself had fixed. The fact that, as petitioner argues (Pet. 29–30), other means of enforcement might have been used, certainly did not preclude the administrative agencies from ordering compliance with a condition which, as we have shown, they had a right to impose. And since violation of such an order was specifically made a crime under the Second War Powers

Act, it was, of course, proper to use criminal sanctions against such violation.

2. Petitioner argues, however (Pet. 6–7, 14–17), that since, at the time it obtained its priority and built its houses,[1] a failure to observe the terms of its agreement with the Government did not constitute a crime, its acts in later selling the houses at excessive prices could not have been criminal, even though the order forbidding sales at prices above those fixed in the application was issued two years before petitioner sold its houses. In other words, petitioner argues that, although it was always unlawful to sell at a higher price than that fixed in the application, and although, long before petitioner sold its houses, it was informed that such an unlawful sale would constitute a crime, nevertheless it should still be considered immune from criminal prosecution.

The mere statement of the argument, we submit, negates its validity. The regulations of February 10, 1943, clearly were not *ex post facto* as to the sales charged in this information, which took place more than two years after those regulations went into effect. Every new criminal statute necessarily makes criminal a type of act which was not a crime before the statute was passed.

[1] We assume, as did the court below (R. 50), that petitioner's houses were completed before February 10, 1943, when the regulations for the first time prohibited sales at prices above those fixed in the applications for priorities It should be noted, however, that this assumption is based on the statement that the construction was performed between March, 1942 and July, 1943 (R. 31).

Nor is there any merit in petitioner's argument that the regulation of February 10, 1943, as applied to it, violated the due process clause of the Fifth Amendment. The regulation merely ordered petitioner to comply with an agreement which it had itself voluntarily made in order to obtain materials which it could not otherwise have obtained. After having obtained the materials and received a benefit from the Government, petitioner is in no position to complain because it is being held to its bargain. Furthermore, it should be noted that the record shows that after February 10, 1943, petitioner applied under National Housing Agency regulations and obtained from that agency permission to sell its houses at a price somewhat higher than the price for which it agreed to sell them in its priority application (R. 30–31). The fact that petitioner did not receive permission to sell at a still higher price certainly did not give it authority to take the law into its own hands.

3. Petitioner also challenges the sufficiency of the information as a pleading (Pet. 7–8, 31–35) on the ground that it is too vague and indefinite to state an offense. The attack is predicated largely on the absence of allegations specifically identifying the priority application filed by petitioner.

Since, however, the offenses here charged were sales at a price above that set forth in the priority application and attending documents, the significant fact is the price fixed by petitioner. That

fact is specifically set forth in the information. In addition, the information identifies the houses sold, the dates of sale, the names of the purchasers, and the sale prices. If petitioner had any difficulty in identifying the priority application referred to, it could have obtained such information by a bill of particulars. Moreover, the statement of petitioner's president at the time of sentence after its plea of guilty (R. 28–35) makes it clear that petitioner was fully informed of the charge against it and had ample opportunity to prepare its defense had it desired to contest its guilt. The information was thus sufficient to meet the test by which its validity must be judged; it informed petitioner of the nature of the offenses and barred future prosecution on the same charges. *Glasser* v. *United States*, 315 U. S. 60, 66; *Hagner* v. *United States*, 285 U. S. 427, 431.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1947.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176), 50 U. S. C. App., Supp. V, 633), provides in part:

> SEC. 2 (a) (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *
>
> (8) The President may exercise any power, authority, or discretion conferred on

him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

By Executive Order No. 8629, dated January 7, 1941 (6 Fed. Reg. 191), the President conferred his power under Section 2 (a) of the Act of June 28, 1940, on the Office of Production Management, and thereafter by Executive Orders Nos. 9024, dated January 16, 1942 (7 Fed. Reg. 329), 9040, dated January 24, 1942 (7 Fed. Reg. 527), and 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720), the President conferred his power under Section 2 (a) of the Second War Powers Act on the War Production Board.

Pursuant to the authority delegated to it, the War Production Board on April 9, 1942, issued Conservation Order L–41 (7 Fed. Reg. 2730), which provided that no new construction be commenced without authorization from the War Production Board, subject to certain exceptions. As to housing, only $20C of new construction a year was permitted without authorization.

Preference Rating Order P–55 was issued September 22, 1941 (6 Fed. Reg. 4842), amended March 2, 1942 (7 Fed. Reg. 1636), and April 20, 1942 (7 Fed. Reg. 2940), providing for allocation of scarce building materials to defense housing projects on the basis of an application form filed by the builder. In pertinent part it provided as follows:

> SEC. 955.4 *Preference rating order P–55.* For the purpose of facilitating the acquisition of Material for the construction of

the Defense Housing Project hereinafter described, a preference rating is hereby assigned to deliveries to the above-named Builder and to deliveries to his Subcontractors and Suppliers upon the following terms:

* * * * *

(2) "Defense housing project" means the housing project described in the Builder's Application on Form PD–105, No. ------, dated ----------, comprising ------ units, as finally approved (hereinafter referred to as the "Application").

* * * * *

(b) *Assignment of preference rating.* Preference Rating ------ is hereby assigned (1) to deliveries to the Builder of those quantities and kinds of Defense Housing Material which may be specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder.

* * * * *

(d) *Restrictions on use of preference rating*—(1) *Restrictions on the builder:*

(i) The Builder may apply the preference rating hereby assigned only to those quantities and kinds of Defense Housing Material specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder. This Order will be cancelled immediately if the Builder is found to have applied the rating to deliveries in excess of his specific authorization.

* * * * *

(h) *Violations.* Any Person who willfully violates any provisions of this Order

or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this Order may be prohibited from receiving further delivery of any Material subject to allocation, and such further action may be taken as is deemed appropriate including a recommendation for prosecution under Section 35A of the Criminal Code (18 U. S. C. 80).

On February 12, 1943, Preference Rating Order P-55 was again amended (8 Fed. Reg. 1951), to include, *inter alia,* the following:

SEC. 1075.7 (f) *Liability of owner.* The owner and any other person who now holds or hereafter acquires any beneficial interest in the housing project or any part thereof, is hereby ordered to comply with all the representations, certifications and promises made by said owner in the Application, except where and to the extent such other person is relieved of such responsibility by regulation of the National Housing Agency.

* * * * *

(i) *Violations.* Any person who willfully violates any provision of this order, or who, in connection with this order, willfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime and, upon conviction, may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control, and may be deprived of priorities assistance by the Director General for Operations, and may be denied permission to begin construction under General Conservation Order L-41.

W. P. B. Preference Rating Order P–55a was issued February 20, 1943 (8 Fed. Reg. 2260), and established conditions relating to the rentals and sales prices applicable to the holding and disposition of war housing units. It contained the following clause:

> (c) *Conditions applicable to owners of war housing.* No person to whom a Preference Rating Order P–55 has been assigned shall transfer or dispose of any dwelling unit to which such order relates, or accept payment of rental or sales price for any such unit except in the manner and for the amount set forth in the application form or in the manner and for the amount approved pursuant to paragraph (a) hereof; nor shall any such person so transfer or dispose of any such unit to any person other than the persons specified in paragraph (b) hereof, except as authorized by regulations or orders of the National Housing Agency.

General Preference Order P–55–b was issued March 27, 1943 (8 Fed. Reg. 3826), and was amended on April 9, 1943 (8 Fed. Reg. 4705), and August 23, 1943 (8 Fed. Reg. 11664). It established a somewhat different system of control. The liability clause was contained in the original Order and all amendments thereto.

The system was again altered somewhat by Limited Preference Order P–55–c issued February 12, 1944, effective March 1, 1944 (9 Fed. Reg. 1696), and amended on April 1, 1944 (9 Fed. Reg. 3564), and February 5, 1945 (10 Fed. Reg. 1483). It provided for the granting of authorization for housing construction and the use of priorities

assistance in acquiring material for such construction, and further provided that the applicant and any other person who held or acquired any interest in the project must abide by all representations, certifications and promises made by him in the application. The liability clause was contained in the original Order and all amendments thereto.

By Executive Order 9070, issued February 24, 1942 (7 Fed. Reg. 1529), under the First War Powers Act of December 22, 1941 (55 Stat. 838), the National Housing Agency was given responsibility for assuring proper occupancy of housing projects for war workers. On February 9, 1943, it issued National Housing Agency General Orders 60–2 and 60–3 (8 Fed. Reg. 1829, 1830), covering private war housing, including housing for which priority assistance had been received under Preference Rating Order P–55, prior to February 10, 1943.

National Housing Agency General Order No. 60–2, § 702.4 (b), provided:

> Private war housing begun prior to February 10, 1943, shall be rented, sold, or transferred only in accordance with the provisions of the application (or other instruments related thereto) for priority assistance, authority to begin construction * * *.

This order was reissued with revisions as General Order 60–2A (9 Fed. Reg. 3065), 60–2B (9 Fed. Reg. 245), and Regulation Order No. 60–2C (9 Fed. Reg. 2816).

National Housing Agency General Order No. 60–3 provided:

> § 702.11 (c) All private war housing begun prior to February 10, 1943, which has not

been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner except that for the duration of the national emergency declared by the President on September 8, 1939:

(1) Rentals or sales prices (except for involuntary transfer and except to the extent approved prior to February 10, 1943, by the War Production Board, or subsequent to February 10, 1943, by the National Housing Agency) shall not exceed the respective maximum amounts permitted by the conditions of the application (or other instruments related thereto) for priority assistance * * *.

§ 702.12. The initial rent charge prior to any occupancy or the sale price for any housing accommodations in a private war housing project may be increased over the amount provided therefor in § 702.11 only when approved by the National Housing Agency. * * * Each National Housing Agency Regional Representative is hereby authorized to grant such relief as he deems appropriate in the particular case, provided the petition for relief shows clearly that the owner has incurred, or will incur, costs in the construction of such housing, over which the owner had or has no control, in excess of the costs estimated originally in connection with such housing.

General Order No. 60–3 was issued with revisions as General Order No. 60–3A (8 Fed. Reg. 12079), General Orders No. 60–3B (8 Fed. Reg. 12080), and No. 60–3C (9 Fed. Reg. 247).

The restrictions on the sale of houses built with priority assistance were continued in all amendments and reissues of these orders.

U. S. GOVERNMENT PRINTING OFFICE: 1947